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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 133

CARL E. KIME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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CARL E. KIME,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Petitioner, Carl E. Kime, prays that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit, which court affirmed the Judgment of the United States District Court for the Northern District of Indiana, South Bend Division. The Indictment,—returned to the February Term A. D. 1950,—charged the petitioner with violation of Section 12 (a) Title I of Public Law 759, approved June 24, 1948, in that he "Unlawfully, knowingly, wilfully and feloniously failed and neglected to perform a duty under the Selective Service Act of 1948 in that * * * refused to carry and have on his person Registration Certificate (SSS Form No. 2) * * *." (Tr.

2.) Petitioner filed his Motion to Quash the Indictment and his alternative Motion for Judgment to Acquit (Tr. 47-48) which motions were denied by the District Court. (Tr. 50.) His further Motion, which the petitioner presented asking for a Judgment to Acquit at the close of the government's case, was also overruled. (Tr. 49-50.) The District Court, having tried the case without the intervention of a jury, found the petitioner guilty of the violation as charged against him in the Indictment. (Tr. 27.) After the matter was referred by the Trial Court to the Probation Office, the judgment was that the petitioner be sentenced to "One year, to be served." (Tr. 32.)

Petitioner in due time filed his appeal to the United States Court of Appeals for the Seventh Circuit setting forth various points on which he relied for a reversal. (Tr. 52-53.) The Court of Appeals affirmed the judgment of the District Court in its cause No. 10304, pursuant to its opinion dated April 25, 1951. (Tr. 62-65.) Petition for Rehearing was filed on the ground that petitioner's contention that, "One cannot be found guilty for conduct which is not made punishable by the law of the land" was left entirely without consideration by the Court of Appeals. (Tr. 72.) Petitioner contended that he, having been charged with violating Section 1617.1 of the Selective Service Rules and Regulations which provides for no penalty for the violation thereof, ought not to have been convicted and his conviction ought to be set aside. (Tr. 73-76.)

On May 23, 1951, the United States Court of Appeals for the Seventh Circuit entered its final order denying Petition for Rehearing. (Tr. 79.)

The opinion of the Court of Appeals is hereto attached as Appendix I following the Supporting Brief that is itself attached to this Petition.

STATEMENT OF MATTERS INVOLVED.

Petitioner, as well as his parents, are members of the Church of the Brethren, which church is known as one of the historical peace churches. (Tr. 5-12.) He studied at Manchester College, which is maintained by his church, and also attended Bethany Biblical Seminary in Chicago studying for the ministry. (Tr. 12.) He is a licensed minister of the church, first having received his license in September, 1947, and was relicensed just two weeks before his trial. (Tr. 12.)

While at Manchester College, Petitioner was a member of the Student Ministerial Group and also a member of the Student Christian Union. While at the Seminary, he was studying general bible courses, Old and New Testament and related subjects. (Tr. 13.) He also was engaged in volunteer service for the Church. The volunteer work provides for a year's service to go wherever the church decides the volunteers are needed. Petitioner may be assigned by the church to missionary work in any part of the world. (Tr. 13.)

In addition to his regular studies at the College and at the Seminary, petitioner studied writings and books of authors dealing with religious philosophy. He particularly studied books discussing the conduct of life based on peaceful means both between nations and individuals. (Tr. 13-14.) Prior to the bringing of the present Indictment here involved, petitioner was Indicted in case No. 1668 charging him with violating the Selective Service Act of 1948 in that he failed and refused to register. (Tr. 5.) Pursuant to this prior Indictment (Plaintiff's Exhibit 1—Tr. 34) he was taken into custody and was released on bond. While so at liberty, Mr. Noble F. Schlatter, Assistant United

States Attorney for the Northern District of Indiana and pursuant to instructions issued from the Attorney General's office and consistent with the regulations of the Selective Service Act, registered petitioner with his draft board No. 72 in South Bend, Indiana. (Tr. 5, 6 and 7.) Petitioner himself never personally registered, claiming all of the time that he, because of his religious beliefs, cannot have anything to do with the war or war effort, including registration. (Tr. 6.)

After petitioner was registered by the Assistant United States Attorney, Indictment No. 1668 was dismissed (Tr. 8) and the Draft Board sent him the registration card. Petitioner returned the same with a letter informing the Board that he cannot carry the card because of his religious belief against war and participation therein in any form. He returned the card:

> "To reaffirm my belief in the teachings of love and peace during this season in which we celebrate the birth of He who we call the Prince of Peace, and whose coming was heralded by angels singing 'Peace on earth, good will to men.'
>
> "May I wish you all a very merry Christmas." (Tr. 8.)

The present Indictment (No. 1745) (Tr. 2) charges petitioner that he failed to comply with Section 1617.1 of the Selective Service Rules and Regulations which states:

> "EFFECT OF FAILURE TO HAVE REGISTRATION CERTIFICATE IN PERSONAL POSSESSION.
>
> "Every person required to present himself for and submit to registration must have a registration certificate SSS Form No. 2 in his personal possession at all times. The failure of any person to have such registration certificate, SSS Form No. 2 in his personal possession shall be *prima facie* evidence of his failure to register."

His non-carrying of a draft card was the only violation charged against petitioner.

It was stipulated that Plaintiff's Exhibit 3, Petitioner's registration card (Tr. 36-37) was completed not by petitioner but by theAssistant United States District Attorney. It was also stipulated that Plaintiff's Exhibit 2 was a letter sent by petitioner returning his draft card (Tr. 35); and further it was stipulated that petitioner did not have a registration card. (Tr. 9.)

Petitioner moved for a Judgment of Acquittal at the close of the government's case on various grounds. The ruling on the motions was reserved by the District Court until the close of all evidence. (Tr. 10 and 11.)

The petitioner,—testifying on his own behalf,—stated that he refused to register for the draft because of his religious beliefs; that he has been taught and was brought up to believe that war is wrong, killing is wrong, because as Christ taught "love is the way of life." (Tr. 11 and 12.) When he returned his registration card on December 11, 1949, he did not do so with the intent of violating the law or to violate Regulation 1617.1, issued under the Selective Service Act, but it was merely his intent to do what he thought was right under God's direction. (Tr. 14.) The Church of the Brethren had, since its very beginning, stated its convictions about war and the attitude which the church commends to its members—that is, "to follow their own conscience." The statement of the Annual Conference of the Church of the Brethren of 1948 was offered as Defendant's Exhibit 1 in evidence. To the offer the Government objected and the same was excluded. (Tr. 14-15.) This rejected Exhibit (Tr. 38-41) sets forth among others that:

> "The Church of the Brethren views with deep concern current proposals to commit our nation to a permanent peacetime policy of military conscription through a revival of selective service or the enactment of universal military training or both. Fearing that these preparations for war will hasten the coming of

actual war, the church finds it necessary to state again its convictions about war, preparation for war, military service, and the attitudes which the church commends to its members, particularly those directly affected by conscription. * * *

"The Church of the Brethren, since its beginning in 1708, has repeatedly declared its position against war. Our understanding of the life and teachings of Christ as revealed in the New Testament led our Annual Conference in 1934 to resolve: 'All war is sin. We, therefore, cannot encourage, engage in, or willingly profit from armed conflict at home or abroad. We cannot, in the event of war, accept military service or support the military machine in any capacity.' This conviction, which we reaffirm in 1948, grew out of (such) teachings of Christ * * *."

"The church has stood likewise for the principle of freedom of worship and freedom of conscience. We cannot, therefore, concede to the state the authority to conscript its citizens for military training or military service against their religious convictions * * * We seek no special privilege from our government. What we seek for ourselves, we seek for all—the right of individual conscience, which no governmental authority can abrogate. As Peter said, 'We must obey God rather than man' * * *

"The Church of the Brethren seeks by processes of education and spiritual nurture to help its members develop within themselves a spirit of peace and an attitude of non-violence as an outgrowth of deep religious conviction * * *

"We believe that our supreme citizenship is in the kingdom of God, but we undertake to render constructive and creative service in the existing state * * * In a Christian democracy we must assume responsibility for helping to create an intelligent and Christian public opinion which will result in legislation in harmony with the eternal laws of God. As Christian citizens, we consider it our duty to obey all civil laws which do not violate these higher laws * * *

"The church seeks to maintain a fellowship of all

who sincerely follow the guidance of conscience. It does, however, recommend that as a matter of Christian conviction and practice, its membership support the historic position of the church, namely, nonparticipation in military training and service and the war system in general. The church pledges its full moral strength and offers spiritual nurture and a fellowship of prayer and of material aid to all who struggle and suffer for a fuller understanding of and obedience to the divine will * * *

"The Church of the Brethren takes the position that our members cannot consistently accept any service with the military forces or under military supervision * * * For those conscientiously opposed to registration or any cooperation with a system of conscription we particularly commend such voluntary service * * *

"The Church of the Brethren has always believed that war is contrary to the will of God and has, in its history of nearly two and one-half centuries, come to understand more clearly the tremendous evil which war brings upon human beings and upon society. The church is, therefore, increasingly committing itself to the prevention of war in addition to its historical position of refusing to participate in war * * * This statement embodies the stage of thought and action which the church has thus far achieved * * *"

Petitioner's refusal to carry his registration card is fully in keeping with the history and teaching of the Church of the Brethren, whose adherents for the past two and one-half centuries have felt compelled to refuse to comply with man-made laws, in obedience to what they considered to be the will of God. (Tr. 38-41.)

The government prosecutor stipulated that certain letters written to the court may be admitted in evidence in lieu of character testimony, thus to show the reputation of the petitioner according to which he is a man of the best

morals who, because of his religious concepts, honestly held, refused to carry his registration card. (Tr. 17.)

Defendant's Exhibit 2, written by Mark Y. Schrock (Tr. 41-43) is written on the letterhead of the Church of the Brethren, Goshen, Indiana stating that the writer is acquainted with the petitioner, having been associated with him for about six years in various relationships. Mr. Schrock for a while was petitioner's pastor, who observed his work in the District Youth Cabinet, working under appointment by the church's District Board of Christian Education. Mr. Schrock found petitioner a person of great responsibility whose integrity of character is above reproach. While it is certain that no one in the fellowship advised petitioner on his refusal:

> "Nevertheless it has no doubt been the teaching and fellowship of the church which has led him to arrive at his present position, in which he cannot conscientiously accept registration for the draft. I believe this same sensitivity to moral issues and courage to stand for his convictions are evident in his other relationships in life * * * To enforce the selective service law as it is written, seems to demand the infliction of penalty upon a person who is not only not on the criminal fringes of society, but who is actually at the extreme opposite position of holding a higher and harder standard for himself than society demands or even recognizes * * * In my humble judgment it would be consistent with the intent of both the law and the regulations to protect the conscience and good name of this man, rather than make him appear to be a criminal and irresponsive member of our society * * *"

Defendant's Exhibit 3 is a letter addressed by John D. Metzler to the Trial Court setting forth that the petitioner:

> "Is a man whose life is consistent with his belief and position on the point in question * * * we need more rather than fewer persons who have a high

> christian standard of right and wrong and who are willing to live according to that standard. A nation of Carl Kimes would be a good nation." (Tr. 43.)

Defendant's Exhibit 4 is a letter written by Dr. Rufus D. Bowman, president of the Bethany Biblican Seminary in Chicago who writes concerning the petitioner that:

> "I have know the young man for several years and respect his convictions highly. He was enrolled in the Bethany Biblican Seminary * * * He did good school work and showed himself to be entirely sincere in his attitudes and devotional in spirit * * * I consider Carl Eugene Kime a young man who is clean in his habits and sincere in his convictions." (Tr. 44.)

The Reverend E. Wayne Gerdes writes concerning the petitioner that:

> "During the nearly four years that I have known him, he has proved his sincerity and integrity to principle in all moral, ethical and religious areas." (Tr. 45.)

From the evidence, the Trial Court found that the petitioner is a sincere individual (Tr. 26). However, it also found that there is no conflict or interference between his duty to comply with the rules and regulations under the Selective Service Act and his duty to his God. The court found that there is no interference by the rules involved with his right to exercise his religious freedom which the Constitution guarantees. (Tr. 26.)

The motions submitted on behalf of the petitioner to Quash the Indictment and Judgment of Acquittal were overruled (Tr. 28), and the defendant was found guilty. (Tr. 27.) He was sentenced to one year. (Tr. 32.) Petitioner appealed. On appeal the petitioner relied for reversal of his conviction on various Constitutional contentions all bottomed on the free exercise of religion guaranteed to him by the First Amendment. (Tr. 52-53.)

In presenting his case before the Court of Appeals, the petitioner relied on all Constitutional points. However, in face of prior decisions of that court (*United States of America* v. *Henderson, Wildman, Schufflebarger and Franz,* 180 F. 2d 711, 714), he argued in particular, in support of his contention, that Section 1617.1 of the Selective Service Rules and Regulations provides for no penalty and since the *prima facie* evidence of his failure to register was overcome by the government's introducing of plaintiff's Exhibit 3 (Tr. 36-37) thereby negating such *prima facie* evidence, his conviction was erroneous and his sentence ought to be vacated. (Tr. 71-76.) The opinion of the Court of Appeals (Tr. 62, 65) ruled solely and exclusively on the Constitutional points and failed to give consideration to the question so raised concerning the absence of any penalty in Section 1617.1, violation of which was charged against the petitioner.

Petitioner asked for a rehearing, urging upon the Court of Appeals a decision on the point left by that court theretofore without consideration. The rehearing was denied on May 23, 1951.

JURISDICTION.

Jurisdiction of this court is invoked under Section 1254, USCA (Judiciary and Judicial Procedure, Title 28, Chapter 646, Public Law 773—80th Congress). The Judgment of the United States Court of Appeals, Seventh Circuit, to be reviewed was entered on the 25th day of April, 1951 and the Petition for Rehearing was denied on May 23, 1951.

QUESTIONS PRESENTED.

I.

Can one be found guilty of a crime for the omission of an act which is not made punishable by the law of the land.

II.

(a) Is the Selective Service Act of 1948, the violation of which was charged against the petitioner by the Indictment here unconstitutional on the ground that it is violative of the rights secured to him by the First Amendment pertaining to religious freedom.

(b) Can the petitioner be found guilty of violating the Act (or rules and regulations thereunder) in the absence of clear and present danger and in absence of criminal intent.

(c) Can the petitioner be found guilty of violating the Act when the evidence discloses that his refusal to carry the draft card raised a Constitutional issue to test the extent to which the Act and the Rules and Regulations thereunder, are applicable to him in face of the Constitutional prohibition against laws restrictive of religious freedom.

REASONS FOR ALLOWANCE OF CERTIORARI.

Petitioner's case raises an important question of Constitutional Law which as far as we know has not been but should be settled by this court:

I.

Can One be Found Guilty of a Crime for the Omission of an Act Which is Not Made Punishable by the Law of the Land.

Section 1617.1 of the Selective Service Act.
United States v. *Seibert*, 2 Fed. 2d 80.
City of Coffeeville v. *Vakas*, 22 Pas. 2d 429.

II.

(a) Is the Selective Service Act of 1948, the Violation of Which Was Charged Against the Petitioner by the Indictment Here, Unconstitutional on the Ground That It is Violative of the Rights Secured to Him by the First Amendment Pertaining to Religious Freedom.

Petitioner, a member and licensed minister of the Church of the Brethren, a historical peace church, can not, for reasons of conscience and pursuant to command of God, participate in any warlike efforts. His refusal of participation includes a refusal to carry a registration card. Such refusal is within his free exercise of religion guaranteed to him by the Constitution.

(b) Can the Petitioner be Found Guilty of Violating the Act (or Rules and Regulations Thereunder) in the Absence of Clear and Present Danger and in Absence of Criminal Intent.

The rule of Clear and Present Danger does not justify the abrogation of religious freedom protected by the Constitution. Furthermore, in absence of criminal intent petitioner ought not be found guilty.

Free Speech and its Relation to Self Government, By Alexander Meiklejohn.
Bridges v. *California,* 314 U. S. 252.
Keegan v. *United States,* 225 U. S. 478.
Okomoto v. *United States,* 152 F. 2d 905.

(c) Can the Petitioner be Found Guilty of Violating the Act When the Evidence Discloses That His Refusal to Carry the Registration Card Raised a Constitutional Issue to Test the Extent to Which the Act and the Rules and Regulations Thereunder, Are Applicable to Him in Light of the Constitutional Prohibition Against Laws Restrictive of Religious Freedom?

West Virginia State Board v. *Barnette,* 319 U. S. 624.
Kovacs v. *Cooper,* 69 S. Ct. 448; 336 U. S. 77.
Cantwell v. *Connecticut,* 310 U. S. 296.
In re Summers, 325 U. S. 561.
Minersville School District v. *Gobitis,* 310 U. S. 586.
Keegan v. *United States,* 325 U. S. 478.
United States v. *Ballard,* 322 U. S. 78; 64 S. Ct. 882.

This court has never decided the question whether or not one may be found guilty and confined to jail or the penitentiary for violation of a law or any rules and regulations thereunder, which fail to prescribe any penalty whatsoever.

This court has never decided the question whether or not one may be found guilty and penalized to the extent of loss of freedom for violating an Act which provides nothing more but for a *prima facie* evidence of failure to comply with another law, when one fails or refuses to do the positive act set forth in that Act. This court did not ever decide whether or not when the *prima facie* evidence is overcome and no penalty whatsoever is attached to the failure of compliance that one nevertheless may be convicted.

This court has never decided the all important question whether or not a person, as petitioner, who sincerely attempts to live a life as he believes he is commanded to do by God, can be found guilty of a crime if he fails or refuses to perform an act demanded by law and which act the petitioner conscientiously believes to be in direct conflict with the laws of God.

We read the many decisions as to the powers and duty of Congress to raise an armed force. We read those decisions and found them to pertain to wartime conditions. Even then, however, we submit that the question was never decided whether or not the laws of man are subordinate or superior to the laws of God. This question was submitted by petitioner both to the Trial Court, and to the Court of Appeals. He believes that this court ought to decide whether or not he, following his religious conviction as he did all through his life, ought to be or even may be stamped a criminal as he was stamped by the Trial Court, or to the contrary the Constitutional prohibition of re-

strictive laws directed against religious practices ought to be upheld. The restriction of religious freedom under all circumstances is abhorrent to the Constitution, and we hopefully submit that this Court ought to intervene so that this case may be heard for the purpose that a definite answer may be given by this court as to the issues so clearly presented by petitioner.

WHEREFORE petitioner prays that a Writ of Certiorari may issue out of and under the seal of this court directed to the United States Court of Appeals for the Seventh Circuit at Chicago, Illinois, commanding that court to certify on a day certain to be herein named, a full and complete transcript of the record and of proceedings had in this case numbered and entitled on its docket No. 10304, to the end that this case may be reviewed and determined by this court; that the said judgment of the United States Court of Appeals for the Seventh Circuit may be reversed by this court and that your petitioner may have such further and other relief in the premises as may seem just and proper.

Respectfully submitted,

CARL E. KIME,

Petitioner,

By: FRANCIS HEISLER,

His Attorney.

Chicago, Illinois,
June 13, 1951.

BRIEF IN SUPPORT OF THE PETITION.

OPINION BELOW.

The opinion of the United States Court of Appeals in the Seventh Circuit, in this case No. 10304, appears on pages 62-65 of the Transcript of the Record and it is also attached hereto as Appendix 1.

JURISDICTION.

The grounds under which jurisdiction of this court is involved are set forth in the Petition preceding this Brief.

STATEMENT OF THE CASE.

The Statement of the Case appears in our Petition preceding this Brief and is not repeated here.

SPECIFICATION OF ERRORS.

The Court of Appeals for the Seventh Circuit erred in ruling against Petitioner on each of the issues set forth in our Petition.

STATUTES AND RULES AND REGULATIONS INVOLVED.

The pertinent provisions of the 1948 Selective Service Act and the Regulations thereunder are set forth at the end of this brief as Appendix No. 2.

ARGUMENT.

I.

Can One Be Found Guilty of a Crime for Conduct Which Is Not Made Punishable by the Law of the Land?

The decision of the United States Court of Appeals for the Seventh Circuit—affirming the judgment of the District Court for the Northern District of Indiana, South Bend Division—is based solely and exclusively on the question whether or not the act charged against the petitioner is protected by the Constitution, which in turn protects religious beliefs. The opinion of the Court says:

> "On this appeal he contends that we should reverse the judgment below because in acting as he did, he was guided by his religious beliefs. He urges further that if the Selective Service Act of 1948 and the regulations made pursuant thereto, are held to obligate him to have a registration certificate in his personal possession at all times, the Act is violative of the First Amendment, and therefore unconstitutional." (Tr. 64.)

The conclusion of the Appellate Court is that, "Neither contention of appellant is tenable." (Tr. 64.)

The conclusion of the Court of Appeals seems to be based on the cases cited by it: namely, *Reynolds* v. *United States,* 98 U. S. 145; *Davis* v. *Beason,* 133 U. S. 333; *Hamilton* v. *Regents,* 329 U. S. 245-268; *Long* v. *State* (Criminal), 192 Ind. 594; 24 A. R. L. 1234 Ann. p. 1237. (Tr. 65.)

We submit that all those cases are holding that one's religious belief cannot be accepted as the justification for conduct "WHICH IS PUNISHABLE BY THE LAW OF THE LAND." We emphasize the above quotation from the opinion of the

Court of Appeals (Tr. 65) since we believe that a Writ of Certiorari ought to be granted, because the Court of Appeals utterly disregarded and failed to give any consideration to the argument presented by petitioner THAT ONE CANNOT BE FOUND GUILTY FOR CONDUCT WHICH IS NOT MADE PUNISHABLE BY THE LAW OF THE LAND. This is the crux of the instant case, and counsel for petitioner so stated during the oral argument when the justices of the Court of Appeals questioned him whether or not he expects that court to reverse itself and its holding in *United States* v. *Henderson, et al.*, 180 Fed. 2d 711-714. Counsel answered and he did so without any equivocation that while the brief submitted presented the Constitutional issues that were passed upon in the *Henderson* Case; however, he also stated that he expects and asked for a reversal not on those grounds but rather on the ground that Section 1617.1 of the Selective Service Rules and Regulations provide *no penalty for the violation thereof.*

Rule 1617.1, violation of which was charged against the petitioner (Tr. 7) provides no penalty whatsoever. It provides, as the opinion of the Court of Appeals sets forth (Tr. 63) that:

> "Every person required to present himself and submit to registration must have a registration certificate SSS Form No. 2 in his personal possession at all times. The failure of any person to have such registration certificate SSS Form No. 2 in his personal possession, shall be *prima facie* evidence of his failure to register."

As the record discloses, the *prima facie* evidence so described by Section 1617.1 was wholly and totally overcome and destroyed by the prosecution itself, when it offered, from the file of petitioner with his local Board, a card registering petitioner under his SS No. 127226846. The Registration Card was admitted in evidence, petitioner having made no objection thereto. (Tr. 9.) (Plaintiff's Exhibit 3, Tr. 36.)

The *prima facie* evidence so having been overcome and Section 1617.1 providing no penalty whatsoever, it became the duty of the Trial Court and that of the Court of Appeals to discharge petitioner.

In the case of *United States* v. *Seibert*, 2 F. 2d 80, the defendant was a bootlegger who stood charged with the violation of the National Prohibition Act (Title 2, Para. 23, Comp. St. Ann. Para. 10138½). The Act makes traveling to solicit orders for liquor a nuisance without making such solicitation a crime or a misdemeanor, nor fixing any penalty for the violation thereof. The court there held that since Congress did not prescribe by the Act that the solicitation of orders be punishable as a crime, therefore **the remedy of the injunction that is provided in the Act is exclusive.** Just as in the Prohibition Act involved in the *Seibert* case, so Section 1617.1, fails to prescribes any punishment for the violation thereof. It simply makes the failure to carry a card a *prima facie* evidence of non-registration. As in the *Seibert* case, so here, the only remedy is the one contained in the section: namely, providing the prosecution with the *prima facie* evidence. When the *prima facie* evidence is—as it was here, overcome by the action of the government itself, showing that petitioner was registered, then there is no room left for conviction and the petitioner should have been discharged.

In the case of the *City of Coffeeville* v. *Vakas*, 22 Pas. 2d 429, the Supreme Court of Kansas considered a City Ordinance regulating pawn brokers and providing penalty for the violation of it. Later an amendment was passed to include within the operation of the ordinance not only pawn brokers but also second hand dealers. The penal provision as theretofore set forth that: "Any pawn broker who shall violate * * * this ordinance shall be fined * * *."

A second-hand dealer was convicted for violating the

city ordinance and he appealed. The city argued that it is fair and reasonable to insinuate into the penal provisions not only the pawn brokers mentioned therein, but also second-hand dealers. The Supreme Court of Kansas, speaking through Justice Thiele disagreed with that contention in saying that:

> "* * * we have no common law crimes or offense, but only such as are created by legislative provision, by statute or ordinance, and a court is powerless to impose a penalty unless the penalty has been denounced by statute or ordinance, and when a penalty is imposed, it must be by virtue of and under authority of such statute or ordinance, and, if the statute or ordinance simply specifies what shall constitute an offense without fixing a penalty for violation, it is a nullity insofar as criminal or quasi-criminal proceedings under it are concerned. In 16 C. J. 68, the necessity of prescribing a penalty is thus stated:
> 'It has been held in some of the cases that where an act is a crime solely by statute, and no penalty is prescribed in the statute, an indictment will be quashed or a judgment arrested; or in other words, that a description, definition, and denouncement of acts necessary to constitute a crime do not make the commission of such act or acts a crime unless a punishment is annexed, for punishment is as necessary to constitute a crime as its exact definition'."

The Court further stated:

> "* * * in discussing punishment or penalty in a city ordinance as essential to its validity, it is said in 43 C. J. 253:
> 'Under the general rule that in order to warrant a sentence upon conviction for the violation of a statute the statute must prescribe punishment, any ordinance or by-law must prescribe the punishment for its violation in order to warrant conviction and sentence therefor. And it has been held that a police ordinance, likewise all amendments thereto, providing no penalty for its violation, is void'."

The Supreme Court of Kansas then cites the *Seibert* case to the effect that:

> **"No legislative enactment makes it an offense, crime or misdemeanor, unless the statute so denominates it, and unless punishment therefor is expressly prescribed."** (Emphasis added.)

Searching the record we find no other cases but the two referred to above. It appears that the law is so elementary that prosecutions were rarely attempted, whenever a law or an ordinance or a rule and regulation failed to provide for a penalty. Along the reasoning of the courts in the *Seibert* and the *Vakas* Cases, petitioner maintains that Section 1617.1 of the Selective Service Act intended nothing but what it said: namely, that the absence of Registration Card in one's possession be *prima facie* evidence of failure to register. In the instant case, this *prima facie* evidence was overcome by government's Exhibit No. 3 (Tr. 36-37) and, therefore, the Trial Court erred when it refused to grant defendant's Motion for Judgment of Acquittal at the close of the government's case. The Court of Appeals further erred when it failed to reverse the judgment of the Trial Court.

II.

(A) Is the Selective Service Act of 1948 Unconstitutional on the Ground That It Is Violative of the Rights Secured to Petitioner by the First Amendment Pertaining to Religious Freedom?

The petitioner was found, by the District Court to be a person of confirmed moral and religious beliefs. In exercising his beliefs, which prompted him to be opposed to war and the war efforts in any form, he is Constitutionally protected, since the free exercise of religion cannot be forbidden by law.

In the case of *West Virginia State Board* v. *Barnette,* 319 U. S. 624, the protection of the First Amendment is extended to the right of the citizen to refuse to salute the American Flag, if such refusal is because of his religious practice. Because the phrase "civil disobedience" is apparently in the mind of some as an act not to be contemplated under any circumstances, it is proper to point out that the *Barnette* Case refers approvingly to the action of the early Quakers, who refused to doff their hats to civil authority—a refusal which in those days and under the circumstances was considered an act of civil disobedience.

In the case of *Murdock* v. *Pennsylvania,* 319 U. S. 105, this Court upheld the right of individuals to colportage of religious pamphlets even though such distribution was charged against them as creating disturbance.

In the case of *Kovacs* v. *Cooper,* 69 S. Ct. 448, this Court gave an answer to those who wrongly claim that the First Amendment protects religious beliefs as long as those beliefs are not carried into practice, contrary to ordinances, statutes or regulations. In that case, this Court said that an ordinance which attempts "censorship of speech or religious practices before permitting their exercise the Constitution forbids their enforcement." In this case, the practice and not only the belief was put under the protection of the First Amendment. Petitioner's practice of refusal on religious ground to participate in the draft even to the extent of carrying a Registration Card is protected. It was said in the *Kovacs* Case, the Constitution forbids the enforcement of the law which attempts to interfere with or censor a religious practice.

In the case of *Cantwell* v. *Connecticut,* 310 U. S. 296, this Court upheld the right of members of Jehovah's Witnesses to play a victrola record which attacked Catholicism, even in streets where the majority of the people

were Catholics, in which case the lower court felt that such act of the Jehovah's Witnesses amounted to provocation.

In the case of *Taylor* v. *Mississippi,* 319 U. S. 583, the right to distribute literature by pacifists directed against the draft laws and against wars, was upheld.

The minority decision in the case of *Schwimmer* v. *United States,* 279 U. S. 644, is today the decision of the majority. Therefore, the minority opinion written by Justice Holmes is pertinent. He said:

> "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate * * *."

In the case of *MacIntosh* v. *United States,* 283 U. S. 631, the minority opinion by now became that of the majority. There Chief Justice Hughes spoke of:

> "* * * the history of the struggle for religious liberty, * * * those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be allegiance to the will of God * * *."

The minority opinion in the case of *In Re Summers,* 325 U. S. 561, may be also cited, since we submit that the minority opinion of four justices therein is now supported by the majority in the case of *Girourard* v. *United States,* 328 U. S. 61. In this latter case the court said:

> "* * * The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our **Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.**

> As we recently stated in "*United States* v. *Ballard*, 322 U. S. 78, 86, 'Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education* v. *Barnette*, 319 U. S. 624'." (Emphasis added.)

Petitioner's position is clearly covered by the dissenting opinion of Chief Justice Stone in *Minersville School District* v. *Gobitis*, 310 U. S. 586, where it was said:

> "I cannot say that government here is deprived of any interest or function which it is entitled to maintain at the expense of the protection of civil liberties * * * The guarantees of civil liberty are the guarantees of freedom of the human mind and spirit * * * They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression. * * * **The very essence of the liberty which they guaranty is the freedom of the individual from the compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guarantees are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.** This seems to me no less than the surrender of the Constitutional protection of the liberty of small minorities to the popular will." (Emphasis added.)

Assuming the Constitutionality of the Selective Service Act of 1948, it must be held that petitioner was not required thereunder to act contrary to his basic religious concepts and convictions.

(B) Can the Petitioner Be Found Guilty of Violating the Act (or Rules and Regulations Thereunder) in the Absence of Clear and Present Danger and in the Absence of Criminal Intent?

The opinion of the Court of Appeals holds that under the terms of the Selective Service Act, "Congress as a matter of grace" gave him and others who religiously object to do service as a member of the armed forces certain relief. (Tr. 64.) Petitioner believes that the term "matter of grace" is misplaced when it is used as against the Constitutionally guaranteed freedom of religion upon which petitioner relies for reversal of his conviction. We do not believe that the Court of Appeals meant that basic rights that are protected by the Constitution may be taken away from a person nor can it be said that Congress does refrain from taking such basic rights as a "matter of grace." Such cannot be the law because this Court stated

> "If there is any fixed star in our Constitutional Constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."
>
> *West Virginia* v. *Barnette,* 319 U. S. 624.

The First Amendment and the protection extended the free exercise of religion, if it means anything, protects religious acts. The members of the Church of the Brethren, and among them the petitioner, believe and they so say that they must act in full compliance with the Command of the Lord. (Tr. 38-41.) As late as 1948, the Annual conference of the Church of the Brethren held in Colorado Springs stated that:

> "The Church of the Brethren, since its beginnings in 1708, has repeatedly declared its position against war. Our understanding of the life and teachings of Christ as revealed in the New Testament led our Annual Conference in 1934 to resolve: 'All war is sin. We, therefore, cannot encourage, engage in, or willingly profit from armed conflict at home or abroad. We cannot, in the event of war, accept military service or support the military machine in any capacity.'" (Tr. 38.)

The history of the Church of the Brethren goes back to 1708—that is prior to the framing of the Constitution. Therefore, it must be assumed that the free exercise of religion as claimed by the members of the Church of the Brethren, was known to the framers of the Constitution and to those who formulated the First Amendment. It must also be assumed, that the free exercise of religion, as claimed by the Church of the Brethren, is protected by the First Amendment.

A review of the writings of those who toiled in writing the Constitution shows a recognition that a conflict may, and sometimes, does exist between the command of God and the command of Congress. There is little doubt that the framers of the Constitution considered the latter subordinate to the former. The American Nation and the philosophy underlying the basic documents of our government has its roots in the Judeo-Christian philosophy and course of conduct emanating therefrom. Holding that one, who as petitioner, sincerely believes that he must live in accordance with the Command of the Lord, may criminally conflict with a man-made law involving his religious beliefs, would negate the basis of our government. We do not believe that this Court did at any time, or will now permit such an assumption.

The Court of Appeals in upholding the conviction of petitioner, takes the position that the understanding of the

members of Congress as to the needs of National Defense from time to time is a paramount and exclusive determinant, to which everything, including the prohibitions contained in the First Amendment must yield. From that erroneous position the conclusion is unavoidable that as against the wisdom of the members of Congress, the prohibition against restriction on religious freedom contained in the First Amendment, must take second place. We believe that this is an error so fundamental that it threatens to negate the whole of the Constitutional basis of this country's government. It is an error because it is an anomaly to believe that the rights originally belonging to the sovereign—that is the people—which were by positive words retained by the people: the restrictions which were positively placed upon Congress, may be disregarded and the powers may be taken and returned to the sovereign, at the pleasure of Congress. Such was not contemplated by those who wrote the Constitution, and particularly when they framed the First Amendment which said without any equivocation, that Congress shall make no laws, "* * * restrictive of the free exercise of religion."

There is an apparent justification for the decision of the Court of Appeals in the precept of "clear and present danger." We do not believe that that precept ought to apply as a whole, and we further believe that if it is applied, it cannot apply to restrict religious freedom. So, it was proven by the clear expose of Professor Alexander Meiklejohn in his book, "Free Speech" (Harper & Brothers, Publishers, 1948). Professor Meiklejohn, in analyzing and comparing the First and Fifth Amendments to the Constitution concludes that the intent was that the First Amendment provide an *unlimited* guarantee of freedom of speech and obviously of the free exercise of religion. He says that the First Amendment:

> "* * * correlating the freedom of speech in which it is interested with the freedom of religion, of press, of assembly, of petition for redress of grievances, places all these alike beyond the reach of legislative limitation—BEYOND EVEN THE DUE PROCESS OF LAW. WITH REGARD TO THEM, CONGRESS HAS NO NEGATIVE POWERS WHATEVER."

Professor Meiklejohn, discussing the basis of the Constitution: namely, the compact between the people and the government,—concludes that the freedoms guaranteed by the First Amendment and the injunctions directed to Congress, are "The basic postulate of a society which is governed by the votes of its citizens."

It appears that we are almost ready to accept that the First Amendment does not mean what it says, and we are almost grateful that there is a certain limitation set on the power of Congress, as to the extent to which our basic freedoms may be restricted. We are almost ready to assume that Justice Holmes' winged phrase of "clear and present danger" is something generally accepted, when in fact Justice Holmes, its author himself, supported by Justice Brandeis, was clearly aware that putting a restriction on this restriction is not only needed but is required. While in the first instance the rule of "clear and present danger" was presented without any qualifications, subsequent decisions added qualifying phrases agreeing that dangers in themselves do not justify the suppression of basic rights guaranteed by the First Amendment. The first judicial interpretation was that an emergency will justify the application of the "clear and present danger" rule. Subsequent qualifications went farther and stated that it may be applied only when the evil to be suppressed is grave, etc. (See Oliver Wendell Holmes, "Collected Legal Papers" (Harcourt, Brace and Howe, New York, 1920). See also Zechariah Chaffee, Jr., "Free Speech

in the United States" (Harvard University Press, 1942) and see Myer Cohen, "Selected Supreme Court Decisions" (Harper & Bros., 1937).)

It is hard if not impossible to disagree with Professor Meiklejohn that accepting the "clear and present danger" theory means in effect that "The compact of self government has been ignored or repudiated." (Opus Cited P. 87.) It is hard, if not impossible, to disagree with him that the unabridged freedom guaranteed by the Constitutional Amendments, "is the rock on which our government stands. With that foundation beneath us, we shall not flinch in the face of any 'clear and present'—or even terrific danger." (Opus Cited p. 91.)

We made it clear, we believe, that we do, as did Justices Holmes and Brandeis, disagree with the "clear and present danger" theory. We may, therefore, go on assuming—without admitting it—that such theory is Constitutionally proper and justified. However, even with such assumption, it is clear that the defendant's right to free exercise of his religion, cannot be restricted in the instant case.

The rule of "clear and present danger" cannot in the case of petitioner deprive him of the protection of the First Amendment. It would be hard, if not impossible, to argue that his refusal to carry a Registration Card represents a clear and present and grave danger to the state security. The pertinent rule is laid down by this Court in *Bridges* v. *California*, 314 U. S. 252, as follows:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost Constitutional boundaries of protected expression, nor do we here. They do no more than

> recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

As against the above, it is hard, if not impossible, to argue that petitioner's refusal to carry a draft card is a substantive evil; or that it is extremely serious; or that the degree of imminence of a danger to the state is extremely high. Petitioner's refusal to carry the draft card is clearly within the protection of the First Amendment, and, therefore, it was error to find him guilty and it was further error on the part of the Court of Appeals to affirm his conviction.

The Trial Court found that the action of petitioner in refusing to carry his draft card is prompted by his deep-seated religious conviction. (Tr. 26.) The Trial Court also found that petitioner's action was in line with the precept of religious practice as set down by the Annual Conference of his church. (Tr. 14-15, 38-41.) In accordance with the elementary law, it is accepted that a person who is not a free agent to choose between morally right and morally wrong, and who then chooses to act on what is called "morally wrong," cannot be held to be a criminal. We do not intend to agree with the Trial Judge that the petitioner chose to act in accordance with a precept that is morally wrong. To the contrary, our argument was and is that the United States Government in filing the Indictment and the Trial Judge in ruling as he did, interpreted the Constitution along a line that is morally wrong. Assuming, however, for the sake of argument that the petitioner's course of conduct was along the wrong lines, even then, since he did so because he was compelled by a power beyond human beings, because he obeyed the Command of

the Lord, therefore, he was not a free agent, and lacked criminal intent and, therefore, he cannot be found guilty. One cannot (with the exception of certain specific laws) be guilty of a criminal act in the absence of criminal intent. In the instant case, the government failed to show any criminal intent, but to the contrary, the evidence disclosed that there was a total absence of such intent on the part of the petitioner. In absence of proof of a criminal intent, the petitioner should have been acquitted on the basis of *Keegan* v. *United States,* 325 U. S. 478:

> "One with innocent motives, who honestly believes a law is unConstitutional and, therefore, not obligatory, may well counsel that the laws shall not be obeyed; that its command shall be resisted until a court shall have held it valid, but this is not knowingly counselling, stealthily and by guile, to evade its command."

We submit that on the basis of the above decision and also on the basis of *Okamoto* v. *United States,* 152 F. 2d 905, petitioner lacking criminal intent and further honestly believing the application of the Act to him to be unConstitutional, was entitled to a Judgment of Acquittal.

(C) Can the Petitioner Be Found Guilty of Violating the Act When the Evidence Disclosed That His Refusal to Carry the Draft Card Was Based on His Sincerely Held Religious Beliefs?

In *Keegan* v. *United States,* 325 U. S. 478, members of the German American Bund were prosecuted on the charge that they counselled evasion of military service. The evidence showed that Keegan actually did counselling by claiming that since the Act in question discriminated against Bund members as to their job holdings, such discrimination made the application of the Act to them unConstitutional. The Court's opinion points out that Kee-

gan stated, "EVERYMAN if he can will refuse to do military duty until this law and all other laws of the country or the states which confine citizenship rights of Bund members are revoked." The Court held that the Trial Judge erred in not granting a Motion for Judgment of Acquittal.

The Act here involved is a penal statute. It is elementary that any criminal statute must be definite so that one bound thereby will know without any question his rights and duties thereunder. So it was said in *Connally* v. *General Construction Co.*, 269 U. S. 385, wherein it is stated:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

We respectfully submit that the Act here involved cannot be considered a Constitutional enactment unless the intention of Congress was that a person as the defendant, —who because of religious belief, cannot comply with certain or any of its provisions,—is not to be covered thereby. It is further submitted that if the Act is to be interpreted that the defendant is to perform a positive act contrary to his religious conviction then the same is unConstitutional and void.

• • • • •

Anticipating the government's answer as to our argument here presented and the likelihood that an attempt will

be made to overcome it by reference to the penalty provisions of the Act itself, we argue further that criminal statutes and rules and regulations thereunder must be definite so that one is apprised of the acts that are forbidden. *Connally* v. *General Construction Co.,* 269 U. S. 385. The Trial Court, in agreement with the Attorney for the Government, repeatedly stated that one's religious beliefs will not excuse him from doing something that is contrary to a law presently on the books. This is not the position taken by the Supreme Court of the United States, as it was expressed in *United States* v. *Ballard,* 322 U. S. 78, 64 S. Ct. 882. In that case, Edna and Donald Ballard were convicted of using and conspiring to use the mails to defraud. They were charged with violating paragraph 215 of the Criminal Code, 18 U. S. C. Par. 338. The charge was that the defendants distributed and sold literature, solicited funds and membership in the "I Am" movement, "by making false and fraudulent representations, pretenses and promises." Conviction followed, and after various appeals, the case came before this Court and Mr. Justice Douglas, speaking for the Court said:

> "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden do-

main. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 63 S. Ct. 870, 891, 87 L. Ed. 1292, 146 A. L. R. 81. As stated in *Davis* v. *Beason,* 133 U. S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637. 'With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.' "

Hardly can it be maintained that petitioner here, whose religious conviction and sincere belief prompted the government to dismiss the prior indictment charging him with failure to register, can justly be convicted now for failure to carry his Registration Certificate by claiming that the provision set forth by this Court does not apply. Petitioner did nothing more than carry on in relation to his Maker and performed the obligation that he thought was imposed upon him by such relationship. He carried out his obligation without interfering with society, with its peace or prosperity, or with the moral of the people. Justice Jackson, in the *Ballard* case, dissenting and holding that the case not only ought to be reversed, but that the indictment ought to be dismissed, stated:

"The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

"Prosecutions of this character easily could degenerate into religious persecution. * * *"

The tolerance expressed by the Supreme Court in the *Ballard* case (*supra*) is far beyond what petitioner here asks for. He asked that the non-violent peace tenets of his church be respected by the Selective Service Act and the rules and regulations thereunder as it is commanded by the First Amendment to the Constitution. He submits that two and one-half centuries of peace history of the church to which he adheres, and the principles of which he follows, justifies him in asking that the ruling of the Trial Court in finding him guilty be reversed.

Conclusion.

We submit, for reasons hereinabove set forth and for the further reason that this Court never spoke on the issues herein raised, require that this Court grant a Writ of Certiorari and upon hearing of the issues make its decision known.

Respectfully submitted,

FRANCIS HEISLER,
7 S. Dearborn St.,
Suite 648,
Chicago, Illinois.

Chicago, Illinois,
June 15, 1951.

APPENDIX I.

IN THE UNITED STATES COURT OF AP
For the Seventh Circuit. ALS

No. 10304. OCTOBER TERM, 1950, APRIL S

SSION, 1951.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
CARL E. KIME,
Defendant-Appellant.

Appea
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from the
States Dis-
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n District
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vision.

April 25, 1951.

Before DUFFY, FINNEGAN & LINDLEY, *Circui*

FINNEGAN, *Circuit Judge.* The appellant, *Judges.*
was indicted for failure to have in his per
sion, at all times, a registration certificate i
the provisions of the Selective Service Act
U. S. C. A. appendix sec. 451, *et seq.*) and of
regulations made thereunder (Selective Se
Regulations No. 1617.1, 32 C. F. R. Chap. 1
After pleading not guilty, the appellant wa
jury, was found guilty by the court and wa
to the custody of the Attorney General, or h
representative, for the period of one year.

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The record discloses that at the October
in the United States District Court for the N
trict of Indiana, South Bend Division, the f
jury indicted appellant for failure to regist
Selective Service Act of 1948. While tha
(South Bend Criminal Cause No. 1668) was
undisposed of, the appellant being at libert

rm, 1948,
thern Dis-
ral grand
under the
ndictment
nding and
nder bail,

a regulation was promulgated authorizing the United States Attorney to register a person, in such circumstances, under the terms of the Selective Service Act and Regulations thereunder.

Pursuant to such regulation the District Attorney of the United States in and for the Northern District of Indiana, South Bend Division, registered the appellant with Draft Board Number 72, using information furnished by appellant's attorney in Cause No. 1668.

After appellant was thus registered on September 19, 1949, the Draft Board Number 72, sent him a registration card. Section 1617.1 of the Selective Service Rules and Regulations provides:

> "Every person required to present himself and submit to registration must have a Registration Certificate, SSS Form No. 2, in his personal possession at all times. The failure of any person to have such Registration Certificate SSS Form No. 2, in his personal possession shall be *prima facie* evidence of his failure to register."

Thereafter in a letter dated December 11, 1949 appellant said to Draft Board Number 72:

> "Dear Sirs:
>
> You are probably aware of the dispensation of my case and the resultant registration of the Assistant U. S. Attorney, Mr. Noble F. Schlatter, from information given him by my attorney, Mr. Francis Heisler. Such information was to be incorporated in the brief Mr. Heisler was to prepare for my defense in the charge that I had refused to present myself for registration at the time and place appointed by the President.
>
> "On the basis of the registration the case against me had been dropped, and the bond had been returned. Also because of this registration you have sent me a registration certificate. However, it remains that I did not register and my feelings regarding registration, preparation for and participation in war have remained unchanged. Therefore I cannot conform with that part of the law requiring me to carry the aforesaid registration certificate in my possession at

all times, nor will I advise the local board of any change of address.

"In accordance with this I am sending back the registration certificate."

The record here submitted for review establishes beyond the shadow of a doubt that appellant has deliberately violated the terms of the Selective Service Act and of the regulations made thereunder. This becomes crystal clear when we consider that appellant was registered under the Selective Service Act of 1940 and was for some time, under said Act of 1940, assigned to a public service camp as a conscientious objector. The present Act of 1948 (50 U. S. C. A. appendix Sec. 456(5)), provides in part:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in the war in any form * * *. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred * * *."

Appellant must have known, therefore, that under the terms of the Act, Congress, as a matter of grace, had provided that conscientious objectors would not be called upon to perform either combatant service as a member of the armed forces of his country, or noncombatant service as a worker in a public service camp, when such service was contrary to their religious convictions. Yet in his letter he spurns the courtesy tendered him by the administrators of the Act, boasts that the fact remains that he did not register, and says: "I cannot comply with the law which requires me to carry the registration card in my possession at all times, nor will I advise the Board of any change of address."

On this appeal he contends that we should reverse the judgment below because in acting as he did he was guided

by his religious beliefs. He urges further that if the Selective Service Act of 1948 and the Regulations made pursuant thereto, are held to obligate him to have a registration certificate in his personal possession at all times, the Act is violative of the First Amendment and therefore unconstitutional.

In our opinion neither contention of appellant is tenable.

A party's religious belief cannot be accepted as a justification for conduct which is made punishable by the law of the land. To permit such justification would be to make the professed doctrine of religious belief superior to the law of the land and in effect would permit every objector to become a law unto himself. *Reynolds* v. *United States,* 98 U. S. 145; *Davis* v. *Beason,* 133 U. S. 333; *Hamilton* v. *Regents,* 293 U. S. 245-268; *Long* v. *State,* 192 Ind. 594; 24 A. L. R. 1234, Annotation p. 1237.

This court held in *United States* v. *Henderson, et al.,* 180 F. 2d 711-714, that the Selective Service Act of 1948 does not violate the First Amendment of the Constitution of the United States. In *Cannon* v. *United States,* 181 F. 2d 354-355, and in *Richter* v. *United States,* 181 F. 2d 591-593, the Court of Appeals in the Ninth Circuit came to the same conclusion. See also *Michener* v. *United States,* 184 F. 2d 712-714, in the Tenth Circuit. In this case we find no occasion to add to what was said in those opinions.

The judgment of the District Court is therefore affirmed.

APPENDIX II.

SELECTIVE SERVICE ACT OF 1948.

The Act, paragraph 453 thereof, sets forth:

"* * * it shall be the duty of every male citizen of the United States * * * who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

PROCLAMATION NO. 2799 OF THE PRESIDENT.

"* * * is required to and shall on that day or any of those days present himself for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent home or in which he may happen to be on that day or any of those days."

SECTION 1617.1 OF THE SELECTIVE SERVICE RULES AND REGULATIONS.

"Every person required to present himself and submit to registration must have a Registration Certificate, SSS Form No. 2 in his personal possession at all times. The failure of any person to have such Registration Certificate SSS Form No. 2, in his personal possession shall be *prima facie* evidence of his failure to register."

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 133

CARL E. KIME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 62-65) is reported at 188 F. 2d 677.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1951 (R. 66) and the petition for rehearing was denied on May 23, 1951 (R. 79). The petition for a writ of certiorari was filed on June 21, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the requirement of section 1617.1 of the Selective Service Regulations that every person required to register under the Selective Service Act of 1948 "must have a Registration Certificate (SSS Form No. 2) in his personal possession at all times" is an unconstitutional restriction upon freedom of religion as applied to conscientious objectors.

2. Whether section 1617.1 of the Selective Service Regulations created an obligation enforceable by criminal sanctions.

3. Whether a belief that a conscription law is morally wrong constitutes a valid defense to a charge of its violation.

STATUTES AND REGULATIONS INVOLVED

The Selective Service Act of June 24, 1948, c. 625, Title I, 62 Stat. 604, provides in pertinent part:

> Sec. 12 [50 U.S.C. App., Supp. 462]. II, III, (a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of

> not more than $10,000, or by both such fine and imprisonment, * * *
>
> * * * * *

Section 1617.1 of the Selective Service Regulations, Ex. O. 9979, 13 F. R. 4180, now codified in 32 C.F.R. (1949 ed.) c. XVI, provides:

> Every person required to present himself for and submit to registration must have a Registration Certificate (SSS Form No. 2) in his personal possession at all times. The failure of any person to have such Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence [1] of his failure to register.

STATEMENT

An indictment filed in May 1950 in the United States District Court for the Northern District of Indiana charged petitioner, an involuntary registrant under the Selective Service Act of 1948, with knowingly and wilfully failing and neglecting to perform a duty required of him under the Act, in that he refused to carry his Registration Certificate with him at all times, in violation of section 12 of the Act (R. 1-2). Petitioner waived jury trial (R. 3). Following a trial by the court, he was found guilty (R. 27) and sentenced to one year's imprisonment (R. 32). On appeal, the Court of Appeals

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[1] The word "evidence" was omitted in the codification, apparently in error.

for the Seventh Circuit affirmed the judgment of conviction (R. 66).

The evidence adduced at the trial is undisputed and may be summarized as follows:

Previous to the present indictment, petitioner, a licensed minister of the Church of the Brethren (R. 12), a member of that church from the time of his childhood (R. 12), who had attended Bethany Biblical Seminary maintained by the Church of the Brethren (R. 12-13), and who was conscientiously opposed to war and war preparation in any form (R. 11-12, 21, 24, 25), failed to register as required by the Selective Service Act of 1948 and was indicted for such failure (R. 5-6; Plf. Ex. No. 1, R. 34). At the Government's request, however, the indictment was dismissed after the local draft board registered him in accordance with its rules (R. 7).[2] Pursuant to such registration the draft board mailed petitioner's registration certificate to him (R. 7) but he returned it to the board with the following letter (R. 9, 14, 19, 20-21; Plf. Ex. No. 2, R. 8, 35):

> You are probably aware of the dispensation of my case and the resultant registration by the Assistant U. S. Attorney, Mr. Noble F.

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[2] Section 1613.13 of the Selective Service Regulations provides for registration by the registrar of the local draft board where the registrant refuses to register. Such registration is given the same force and effect as if the registrant had signed the registration card himself. As a matter of policy, the Department of Justice tries to have recalcitrant conscientious objectors registered under the provisions of this section (R. 7).

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Petitioner testified that carrying t
tion certificate "is part of the whole sygistra-
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affected my conscience, if I carried i"; "it
He further testified that although he k. 21).
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law required him to carry his registration certificate he returned it to the local draft board, not with an intent to evade the law (R. 14, 19), but because "it was my intent to do what I thought was right under God's direction" (R. 14).

ARGUMENT

1. Petitioner's principal contention (Pet. 22-31) is that the requirement of section 1617.1 of the Regulations that every person must have his registration card in his possession at all times is an unconstitutional restriction upon freedom of religion as applied to conscientious objectors. He argues that the First Amendment provides an absolute guarantee of the freedom of religion, but that, even if that freedom can ever be restricted in the manner attempted, it can be done only when a "clear and present danger" warrants its restriction, and that such a danger does not exist here. These arguments against the validity of the Act are not new. They were advanced in urging the unconstitutionality of the registration requirements imposed by section 3 of the Act as applicable to conscientious objectors in *United States* v. *Henderson,* 180 F. 2d 711 (C.A. 7), certiorari denied, 339 U.S. 963-964. We fail to see any significant difference between the registration requirements sustained in the *Henderson* case, *supra,* and the requirement here to carry a registration card. Accordingly, we respectfully refer the Court to our brief in opposi-

tion to certiorari in the latter case (Nos. 716-719, O. T. 1949, pp. 5-7). See also *Cannon* v. *United States,* 181 F. 2d 354 (C.A. 9), certiorari denied, 340 U.S. 892; *Richter* v. *United States,* 181 F. 2d 591 (C.A. 9), certiorari denied, 340 U.S. 892.

2. Petitioner urges (Pet. 18-22) that it is not an offense under the Act for a registrant knowingly to refuse to carry his registration certificate, as required by section 1617.1 of the Regulations. This section provides that "every person required to present himself and submit to registration must have a Registration Certificate (SSS Form No. 2) in his personal possession at all times." Section 12 of the Act, in turn, provides for punishment of "any * * * person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * *." The statutory obligation is simple and unambiguous. The failure to obey such regulations has been repeatedly recognized by the courts as constituting a crime. See *United States* v. *Haug,* 150 F. 2d 911 (C.A. 2); *Stumpf* v. *Sanford,* 145 F. 2d 271 (C.A. 5), certiorari denied, 324 U.S. 876; *Bartchy* v. *United States,* 132 F. 2d 348, 349 (C.A. 5), reversed on ground of insufficient evidence, 319 U.S. 484; *United States* v. *Lembo,* 76 F. Supp. 209 (E.D. Pa.), reversed on other grounds *sub nom. United States* v. *Aleli,* 170 F. 2d 18 (C.A. 3); *United States*

v. *Minder,* 63 F. Supp. 369 (S.D. Cal.); affirmed, 157 F. 2d 856 (C.A. 9).

Although section 1617.1 does not use the word "duty," the words "must have" amount to the same thing and clearly impose an obligation upon the registrant to carry his registration card with him at all times. *United States* v. *Lembo, supra.* Section 12 makes knowing failure to perform such duty a criminal offense. Petitioner argues (Pet. 22) that section 1617.1 as a whole imposes no duty at all, but that, by virtue of the second sentence which provides that the failure of a registrant to have the registration certificate in his personal possession "shall be prima facie evidence of his failure to register," it simply states a rule of evidence in prosecutions for failure to register. This not only robs the carefully chosen words of the first sentence of their plain meaning, it robs them of any meaning at all, since the rule of evidence, which petitioner argues is the intendment of the whole of section 1617.1, is completely contained in the second sentence of that section.

Petitioner's further contention (Pet. 33-34)[3] that, if section 12 of the Act and section 1617.1 of

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[3] It is questionable whether this contention can now be advanced since petitioner did not assert it in the trial court. Cf. *Yakus* v. *United States,* 321 U.S. 414, 444-448. His motions for dismissal of the indictment and for a judgment of acquittal introduced at the close of the Government's case and renewed at the close of the case were based entirely on the invalidity of the card carrying requirement of the Act as applied to conscientious objections and on the lack of criminal intent (R. 10-11, 25).

the Regulations are thus to be interpreted, they fail to meet the standard of definiteness required of criminal statutes, is without merit. Section 1617.1 which states that every registrant "must have" his registration card in his possession at all times is certainly sufficiently definite to make the duty clear. So is Section 12 of the Act which makes it an offense "knowingly" to fail to perform a duty under the regulations. See *Screws* v. *United States,* 325 U.S. 91, 101-105; *Gorin* v. *United States,* 312 U.S. 19, 27-28. Petitioner's own testimony (R. 19) indicates that he was well aware of the requirements of the law. See also his letter to the draft board, *supra,* p. 5.

3. Likewise without merit is petitioner's final contention (Pet. 31-36) that, although he intentionally refused to carry the registration card, he lacked the criminal intent necessary to a valid conviction because his action was motivated by religious principles. Willful disobedience of the law of the land is not excused by a claim of religious sanction. *Cleveland* v. *United States,* 329 U.S. 14; *United States* v. *Henderson, supra,* p. 713-716. The case at bar is on all fours with the *Henderson* case, *supra,* so far as this contention is concerned. (See brief in opposition to certiorari in that case, Nos. 716-719, O.T. 1949, pp. 7-8).

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1951.

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